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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

FUKOKU KOGYO CO., LTD. AND HACHIRO SATO,

Petitioners,

—v.—

C. ITOH & CO., LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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September 1989

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COUNTERSTATEMENT OF THE CASE

Respondent/additional counterclaim defendant C. Itoh & Co., Ltd. ("C. Itoh Japan") respectfully submits this brief in opposition to the petition for writ of certiorari to review the dismissal of all claims against C. Itoh Japan for lack of *in personam* jurisdiction. The reasons for such dismissal are set forth in the decision dated November 4, 1988 of the United States District Court for the District of New Jersey, which was affirmed, without opinion, by order dated June 21, 1989 of the United States Court of Appeals for the Third Circuit.¹

¹ The district court decision and Third Circuit order are set forth in Appendices C and A, respectively, to the Petition.

The district court correctly found that C. Itoh Japan, a Japanese trading company with its principal place of business in Japan, had not engaged in activities in New Jersey so as to make it subject to the specific jurisdiction of the court, nor did it have direct physical presence in New Jersey upon which general jurisdiction could be based. After examination of evidence as to the relationship between C. Itoh Japan and its wholly owned subsidiary, C. Itoh & Co. (America) Inc. ("C. Itoh America", a New York corporation which does business in New Jersey),² the district court further held that general jurisdiction over C. Itoh Japan could not be predicated on the New Jersey activities of its subsidiary, C. Itoh America. Specifically, the district court held that the "requisite degree of control" by C. Itoh Japan over C. Itoh America for the exercise of personal jurisdiction was lacking. (Decision, 16c-17c).

It is petitioners' contention that this Court should review the finding that *in personam* jurisdiction over C. Itoh Japan cannot be predicated on the New Jersey activities of C. Itoh America. There is, however, no reason for granting the petition, for the considerations set forth in United States Supreme Court Rule 17.1 are notably absent.

In an effort to persuade this Court that the decision below is somehow in conflict with decisions of other circuits, petitioners have resorted to the basest of tactics; they have chosen to misstate to this Court the content of the decision below. Specifically, the petition represents that the decision below (a) rested its holding upon *Cannon Manufacturing Co. v. Cudahy Pack-*

2 C. Itoh Japan has numerous wholly owned subsidiaries throughout the world, including C. Itoh America. In addition to the wholly owned subsidiaries, C. Itoh Japan also holds at least a 20 percent interest in the following entities: American Isuzu Motors, Inc.; Isuzu Truck of America, Inc.; ATR Wire & Cable Co., Inc.; Mazda Motors (Deutschland) G.m.b.H.; Mitsui-C. Itoh Iron Pty., Ltd.; Kobe Alumina Associates (Australia) Pty., Ltd.; Mazda Canada Inc.; Industrias Unidas, Sociedad Anonima; Ayaha Industry K.K.; Takiron Co., Ltd.; C. Itoh Fuel Co., Ltd.; Nisseki-C. Itoh Petroleum Co.; Sanko Paper Co. Ltd.; Shibushi Silo Co.; Japan Communication Satellite Co.; Nikko Shoji K.K.; Fuji Oil Co., Ltd.; Morita Industry; Sanko Steel Industry; Relian K.K.; Nishi-Hiroshima Developing Co., Ltd.; and Sunny K.K.

ing Co., 267 U.S. 333 (1925), and (b) thereby precluded "an analysis of the nature and degree of control of the activities of the domestic subsidiary by the foreign parent" on the question of *in personam* jurisdiction over the foreign parent (C. Itoh Japan). (Petition, i, 1, 4-10).

As will be shown below, these representations as to the content of the decision below are false. The decision not only did not rest on *Cannon Manufacturing*, it did not even cite *Cannon Manufacturing*. Moreover, it utilized the very "control" analysis which petitioners claim was precluded by purported reliance on *Cannon Manufacturing*.

The present case is not an appropriate vehicle for this Court to reexamine *Cannon Manufacturing*.

REASONS FOR DENIAL OF THE PETITION AND FOR AWARD OF DAMAGES

POINT I

PETITIONERS' ARGUMENT THAT THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS IS PREDICATED ON A MISSTATEMENT OF THE DECISION BELOW.

Petitioners' argument that there is a conflict between the circuits is predicated on the premise that the decision below relied on *Cannon Manufacturing*, thus "precluding an analysis of the nature and degree of control of the activities by the foreign parent". (Petition, i, 1). Petitioner further contends that by relying on *Cannon Manufacturing*, the court below failed to take into consideration the due process standards of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). (Petition, i, 4, 9).

The argument is fallacious for at least three reasons. Contrary to petitioners' assertions, the decision below: (1) did not rest on *Cannon Manufacturing*, (2) did in fact address the degree of control by the C. Itoh Japan over its subsidiary, and (3) did take into account the due process standards of *International Shoe* and its progeny.

With respect to the first point, petitioners' repeatedly stating that the decision below rested on *Cannon Manufacturing* (see, e.g., Petition, i, 1, 4) does not make it true. The decision did not even cite *Cannon Manufacturing*.

Second, the argument that *Cannon Manufacturing* precluded "an analysis of the nature and degree of control of the activities of the domestic subsidiary by the foreign parent" (Petition, i, 1) is equally fallacious. The court below in fact applied a "control" test to determine whether personal jurisdiction could be exercised over C. Itoh Japan on the basis of C. Itoh America's activities. More specifically, it utilized the following test for the exercise of personal jurisdiction:

"[t]he subsidiary which is doing business must be acting as the agent of the parent or the parent must exercise such control over the subsidiary as to make them one entity. *Else v. Inflight Cinema International Inc.*, 465 F.Supp. 1239, 1242-43 (W.D. Pa. 1979)" (emphasis added) (Decision, 15c)

In determining whether C. Itoh Japan exercises such control over C. Itoh America as to make them "essentially one entity", the district court considered factors similar to those used in deciding whether to allow piercing the corporate veil. The court then analyzed evidence submitted by affidavits on both sides regarding the relationship between the two companies. On the basis of such analysis, it found both the "requisite degree of control" by C. Itoh Japan over C. Itoh America and the requisite "disregard of separate corporate existence" for the exercise of personal jurisdiction to be lacking. (Decision, 17c)

Third, the suggestion that the district court disregarded the due process standards of *International Shoe* and its progeny is also without merit. The decision itself began with a review of the due process standards for the exercise of personal jurisdiction over a nonresident. Among the United States Supreme Court decisions cited and relied upon below were: *International Shoe, supra, Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.

286 (1980), *Shaffer v. Heitner*, 433 U.S. 186 (1977), *Hanson v. Denckla*, 357 U.S. 235 (1958), and *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). (Decision, 12c-13c).

In summary, petitioners' contentions as to why this Court should grant a writ of certiorari are based on misstatement of the decision below. The decision below raises no conflict between the circuits. We respectfully submit that this Court should not exercise its discretion to review it.

POINT II
DAMAGES SHOULD BE AWARDED TO RESPONDENT.

United States Supreme Court Rule 49.2 provides for the award to respondent of appropriate damages when a petition for writ of certiorari is "frivolous". In view of petitioners' arguments predicated on *Cannon Manufacturing*, characterizing of the petition as merely "frivolous" would seem charitable. We respectfully submit that an award of damages to C. Itoh Japan under United States Supreme Court Rule 49.2 is appropriate.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny the petition for writ of certiorari and award damages, pursuant to United States Supreme Court Rule 49.2, to respondent C. Itoh Japan.

Dated: September 25, 1989

Respectfully submitted,

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